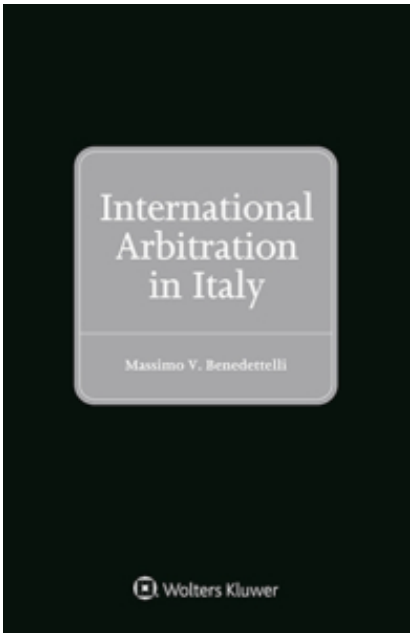
Massimo V. Benedettelli, International Arbitration in Italy



Arbitration community lacked a comprehensive guide in English to move through the multiple and multifaceted connections between arbitration and the Italian legal system: *International Arbitration in Italy* fills in this gap, addressing both international commercial and investment arbitration.

The book deeply depicts said connections, raising interpretative problems and providing solutions with the view to building a coherent system against the backdrop of the author's thought about the phenomenon of the arbitration taken as a whole.

This approach qualifies the entire analysis elaborated on in 12 Chapters, which start with the focus on what international arbitration is and what its grounds are, then moving on how arbitration "dialogues" with the different sources of Italian law, and what the principles for the right interpretation of this law are.

The book proceeds on "traditional" topics pertaining to a handbook of international commercial arbitration (the interplay between arbitration and national courts, the arbitration agreement, the arbitral tribunal, the arbitral proceedings, the provisional measures, the law applicable to the merits, the costs

of arbitration, the different awards, related challenges, recognition and enforcement) with a closing attention to investment arbitration.

International Arbitration in Italy also includes three useful appendices which gather the main provisions of Italian law on arbitration (1), the rules of arbitration of the Milan Chamber of Arbitration (2) and the list of the Bilateral Investment Treaties in force for Italy (3).

Given its well-balanced theoretical and practical approach, the book will stimulate the scientific debate while helping practitioners to handle even the trickiest cases featuring interactions between international arbitration and Italian law.

Ulla Liukkunen on Chinese private international law, comparative law and international commercial arbitration – launch of Ius Comparatum

Guest post by Ulla Liukkunen, Professor of Labour Law and Private International Law at the University of Helsinki and Director of the Finnish Center of Chinese Law and Chinese Legal Culture

The International Academy of Comparative Law launched a new open access publication in November 2020. Volume no 1 on the use of comparative law methodology in international arbitration contains articles by Emmanuel Gaillard, Sebastián Partida, Charles-Maurice Mazuy, S.I. Strong, Johannes Landbrecht, Morad El Kadmiri, Marco Torsello, Ulla Liukkunen, Alyssa King, Alexander Ferguson, Dorothée Goertz and Luis Bergolla as well as introductory remarks on the topic by the Secretary-General of the Academy, Diego P. Fernández Arroyo.

The volume no 1 is available on aidc-iacl.org/journal.

The article “Chinese context and complexities — comparative law and private international law facing new normativities in international commercial arbitration” was written by Ulla Liukkunen, Professor of Labour Law and Private International Law at the University of Helsinki and Director of the Finnish Center of Chinese Law and Chinese Legal Culture.

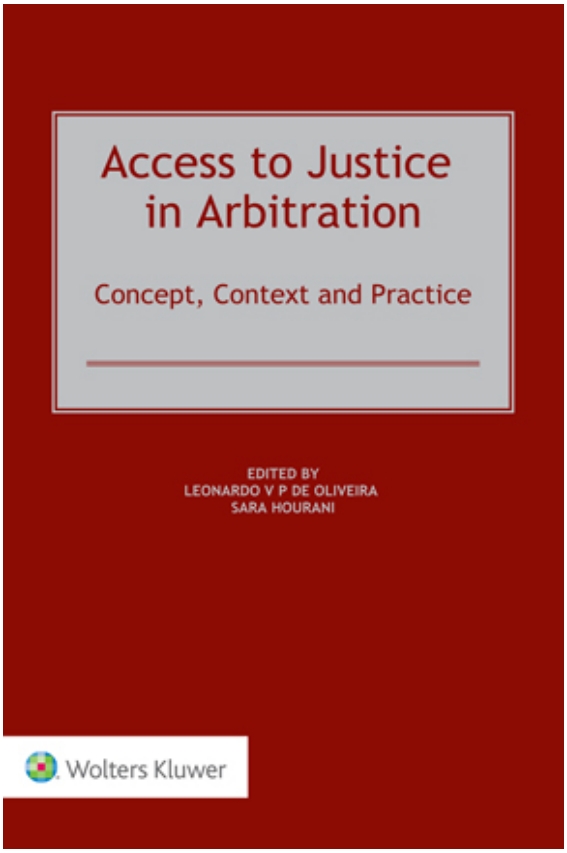
Professor Liukkunen examines international commercial arbitration from the perspective of Chinese developments, noting that, in global terms, the organization of cross-border dispute resolution is changing as a part of the Belt and Road Initiative (BRI) development. With the BRI, Chinese interest in international commercial arbitration has gained a new dimension as BRI promotes the expansion of Chinese dispute resolution institutions and their international competitiveness.

According to Liukkunen, these developments challenge the current narrative of international arbitration. She explores private international law as a framework for unfolding noteworthy characteristics of the Chinese legal system and legal culture that are present in international commercial arbitration and can be linked to an assessment of the role of the BRI in shaping the arbitration regime. A rethink of comparative methodology is proposed in order to promote an understanding of Chinese law in the arbitration process.

Moreover, Liukkunen argues that considerations of the Chinese private international law and arbitration regime speak for a broader comparative research perspective towards international commercial arbitration. In the international commercial arbitration frame under scrutiny, we can see the conception of party autonomy placed in a Chinese context where the state is shaping the still relatively young private international law frame for exercise of that freedom and certain institutional structures are advocated where party

autonomy is placed. Chinese development underlines the connection between the legal regime of arbitration and endeavours by the state, thereby requiring assessment of party autonomy from the perspective of the regulatory framework of private international law that expresses the complex dichotomy between private and public interests.

Out now: Leonardo de Oliveira/Sara Hourani (eds.), Access to Justice in Arbitration



Access to justice is not a new topic. Since Mauro Cappelletti and Bryant Garth's survey of different methods to promote access to justice was published (Access to Justice. A World Survey (Giueffre SIJTHOFF 1978), making access to justice cheaper and effective has become a legal policy (see for instance The Right Honourable the Lord Woolf report on Access to Justice, 1996). One of Cappelletti and Garth's ideas was that there were three waves of access to justice. The third wave, called 'The Access to Justice Approach', stated that arbitration would play a significant role in fomenting access to justice. The idea was that people would seek alternatives to the regular court system. Arbitration has grown exponentially since the publication of Cappelletti and Garth's work, reaching disputes that were traditionally only decided by courts. The guarantee of adequate access to justice is now generating questions about the impact of this expansion. For purely commercial arbitration, such as one between two multinational companies represented by multinational law firms, waiving some rights of access to justice might not create a problem to the fairness in the arbitral procedure. However, in a dispute in which the inequality of bargaining power is evident, for arbitration to be fair and a trustworthy sustainable dispute resolution method, waiving rights to access to justice might not be the best way forward.

With the above ideas in mind, this book aims at presenting a collection of studies about access to justice in arbitration to present, for the first time, in one single title, an analysis of the role access to justice plays in arbitration. The book makes a unique contribution to the current international research and practice of arbitration as it looks at the conceptual contribution to the notion of access to justice in arbitration; and it provides a picture of how access to justice works in various types of arbitration. In five parts, the book will show the concerns about access to justice in arbitration, how they are materialised in a practical scenario and finally, how it is applied in arbitral institutions.

The book's first part brings a conceptual contribution to the notion of access to justice in arbitration and deals with theoretical and conceptual gaps in this area. Leonardo V.P. de Oliveira starts with a conceptual analysis of access to justice and how it should be applied in arbitration. Clotilde Fortier looks at consent as the central part of arbitration and how it relates to access to justice. Joao Ilhão Moreira examines if arbitration can provide a fair, independent and accessible dispute resolution mechanism outside large contractual disputes and Ramona Elisabeta Cirlig assesses the interaction between courts and arbitral tribunals as a guarantor of access to justice.

The second part of the book discusses two specific points in investment disputes. Berk Dermikol looks at the possibility of bringing an autonomous claim based on the NYC in investment treaty arbitration as a form of access to justice. Crina Baltag evaluates the issue of access to justice and non-disputing parties – amici curiae– in investment law and arbitration.

In the third part, access to justice in specific types of disputes submitted to arbitration is scrutinised. Carolina Morandi presents a case study of access to justice in labour and employment arbitration in light of the Brazilian and the US experiences. Ian Blackshaw looks at how sports disputes submitted to CAS have been dealing with the question of access to justice. Johanna Hoekstra and Aysem Diker Vanberg examine access to justice with regards to competition law in the EU with a view to determine whether arbitration can lower barriers. Lastly, Youseph Farah addresses the use of unilaterally binding arbitration as a mechanism to improve access to justice in business-related human rights violations.

Part four reports on two aspects of technology and access to justice. Mirèze

Philippe looks at ODR as a method to guarantee access to justice whilst Sara Hourani investigates how Blockchain-based arbitration can be used to improve access to justice.

Lastly, the book presents the view of how two arbitral institutions deal with the question of costs and access to justice, and how the rules of one arbitral institution provide access to justice guarantees. Aislinn O'Connell assesses access to justice under WIPO's Arbitration Rules whilst Christine Sim examines costs at SIAC and Duarte Henriques and Avani Agarwal do the same in relation to ICSID.

How Chinese Courts Tackle Parallel Proceeding Issues When Offshore Arbitration Proceeding Is Involved?

(The following case comment is written by Chen Zhi, a PhD candidate at the University of Macau?

The parallel proceeding is a long-debated issue in International Private Law, by which parties to one dispute file two or more separate dispute resolution proceedings regarding the same or similar problems. Such parallel proceedings will increase the cost and burdensome of dispute resolution, and probably result in the risk of conflicting judgements, undermining the certainty and integrity of it. In the field of international civil and commercial litigation, parallel proceeding issue is always subject to domestic civil procedure rules or principles like lis pendens, res judicata and forum non-convenience, while the problem may be complicated when arbitration proceeding is involved. According to the New York Convention, state court which seizes the dispute has an obligation to refer the case to arbitration at the party's request, except in case the arbitration agreement is void, inoperable or unable to be performed. Nonetheless, the New York Convention does not address the standards for the validity of arbitration

agreement nor the scope of judicial review on such agreement. In particular, it is silent on the scenario where the validity of the same arbitration agreement is filed before the judges and arbitrators simultaneously. This problem can be exacerbated when the court seizure of the issue concerning validity of arbitration agreement is not the court in the place of the seat of arbitration, which in principle does not have the power to put final words on this issue.i

Some jurisdictions are inclined to employ an arbitration-friendly approach called prima facies review, by which the court will constrain from conducting a full review on the substantive facts and legal matters of the case before the tribunal decide on the jurisdictional issues, and grant a stay of litigation proceeding accordingly. This approach derives from a widely accepted principle across the world called "competence-competence" which endows the tribunal with the power to decide on its jurisdiction.ii Admittedly, prima facies review is not a corollary of the competence-competence principle. Still, it was instead thought to maximize the utility of competence-competence and enhance the efficiency of arbitration by minimizing the judicial intervention beforehand.

However, some jurisdictions like Mainland China do not employ a prima facies review, and they are reluctant to acknowledge tribunal's priority in deciding jurisdiction issue, irrespective of the fact that the seat is outside their territories. This article aims to give a brief introduction on the most recent case decided by the Supreme People's Court (hereinafter as SPC), and discuss how Chinese courts would like to tackle parallel proceeding.

Case Information

Keep Bright Limited?Appellant?v. SuperAuto Investments Limited and others 2013 Min Zhong Zi No. 3 (hereinafter as Keep Bright Case), decided on 20 December 2018.

Facts and background

The dispute regards four parties, among which two major ones are companies both incorporated in the British Virgin Islands: Keep Bright Limited and SuperAuto Investments Limited (hereinafter as K and S respectively). All parties signed a Letter of Intent (LOI) on 12 April 2006 regarding a complicated transaction which involved two main parts; the first part is the transfer all share of S's Hong Kong based 100% subsidiary to K, the second part is the transfer of title of a real estate located in Zhuhai, Guangdong Province. The LOI stipulated that it shall be governed by and construed according to the Hong Kong law, while the dispute resolution clause provided that any dispute arises from the LOI can be referred to either arbitration in Hong Kong or litigation in the location of the

asset.

Following the conclusion of the contract, both K and S were dissatisfied with the performance of the LOI and commenced separate dispute resolution proceedings. K initiated an arbitration before the Hong Kong International Arbitration Center (HKIAC) in March of 2010, while S filed a lawsuit against H and other parties before the Guangdong Provincial Court in April of the same year. Following two partial awards in 2011 and 2012, the HKIAC tribunal concluded the proceeding through rendering a final award in 2014, and K subsequently sought for enforcement of the awards which was granted by the Hong Kong Court of First Instance in 2015.

The litigation proceeding in Guangdong Court, instead, was still ongoing during the arbitration in Hong Kong, and for this reason, in 2011 K applied for a stay of litigation proceeding due to ongoing arbitration concerning the same matter in Hong Kong before the court, but the latter dismissed such request. The Guangdong Court issued its judgment on August 2012 which was contradictory with the awards given by the HKIAC, by using laws of Mainland China as the governing law by reason of failure to identify relating Hong Kong laws under the choice-of-law clause of LOI. The case was then appealed to the SPC, leaving two main issues to be decided: first, whether the Guangdong Court's rejection to the stay of proceeding constituted a procedural error, and second, whether the Guangdong Court has wrongfully applied the law of Mainland China instead of the Hong Kong law.

The decision of the SPC

As for the first issue, SPC decided that parallel proceeding phenomenon shall not prejudice the jurisdiction of courts in Mainland China, except in case the arbitration awards rendered offshore has been recognized in China already. Therefore, it is proper for the Guangdong Court to continue litigation proceeding irrespective of the ongoing arbitration in Hong Kong. The SPC also noted in its final decision that H did not raise an objection to jurisdiction before the court based on the arbitration agreement.

As for the second issue, the SPC found that Guangdong Court was in error in the application of law and overturned the substantive part of the Guangdong Court's decision, making the judgment in line with awards in Hong Kong.

Comment

By the above decision of the SPC, it's clear that courts are in no position to decide on the stay of proceeding despite a pending arbitration outside the territory of Mainland China, with one exception that is the case of arbitration proceeding

concluded, recognized and ready to be or already under enforced by Chinese courts. This approach is in line with the stipulation of the SPC's Judicial Interpretation on Civil Procedural Law in 2015 which tackle parallel proceedings where parties have filed other litigation proceeding before courts other than Mainland China regarding the same or identical dispute. iii Though the Judicial Interpretation does not cover parallel proceeding involving arbitration, the Keep Bright Case reveals that it makes no difference. There is no comity obligation for arbitration.

Moreover, though no objection to jurisdiction was raised in Keep Bright, it is safe to conclude that Chinese courts would likely grant arbitration tribunals the priority to decide on the jurisdiction issue, even when they are not the court in the place as the seat of arbitration, which, per the New York Convention, should have no power to put the final word on the effectiveness of arbitral agreement or award. As per another case ruled in 2019, a court in Hubei Province refused to recognize and enforce a Hong Kong seated arbitral award based on the reason that court in Mainland China had decided otherwise on the jurisdictional issue, by which the recognition of such an award would constitute a breach of public policy.iv

In a nutshell, Chinese courts' approach to coping with parallel proceeding is far from pro-arbitration, contrary to other arbitration-friendly jurisdictions like England, Singapore, France and Hong Kong SAR. Admittedly, effective negative approach is not a standard fits for all circumstances, and it may cause prejudice to the parties when the enforcement of arbitration agreement is burdensome (in particular, boiler-plate arbitration clauses in consumer agreement which are intendedly designed by the party with more substantial bargain power for circumvention of judicial proceeding). Nonetheless, in the circumstances like the Keep Bright, proceeding with two parallel processes at the same time could be oppressive to the parties' rights. It could likely create uncertainty through conflicting results (which occurred in Keep Bright itself). With this respect, the negative effective approach seems to be the best approach to keep dispute resolutions cost and time-efficient.

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i, As per Article 5.1(a) of New York Convention, which stipulates that validity of arbitration agreement shall be subject to the law chosen by parties, failing which shall be subject to the law of the country where the award was made (arbitration

seat), see also Article 6 of New York Convention which said that the enforcing court may stay the enforcement proceeding if the setting aside application is seized by competent court.

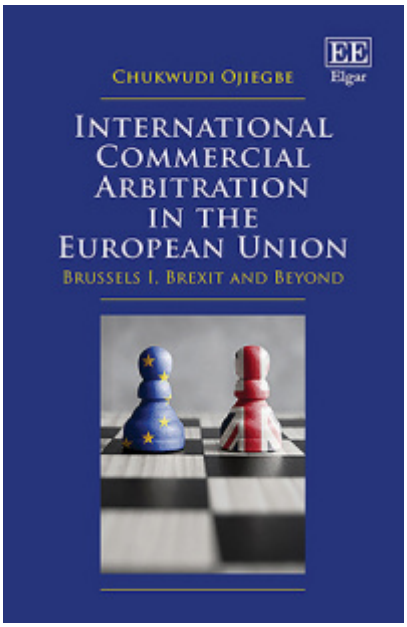
ii, For instance, English Court of Appeal stated in landmark Fiona Turst that: "[…]that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute". Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ 20, at 34. See also judicial opinions by court of Singapore in Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57 , court of Hong Kong PCCW Global Ltd v Interactive Communications Service Ltd [2007] 1 HKLRD 309, and France court in Société Coprodag et autre c Dame Bohin, Cour de Cassation, 10 May 1995 (1995?

iii, See the controversial Article 533 of SPC's Interpretation on Application of Civil Procedure Law(adopted in 2015) ,which stipulates that: "Where both the courts of the People's Republic of China and the courts of a foreign country have jurisdiction, the People's Court may accept a case in which one party files a lawsuit in a foreign court and the other party files a lawsuit in a court of the People's Republic of China. After the judgment has been rendered, no application by a foreign court or request by a party to the case to the People's Court for recognition and enforcement of the judgment or ruling made by a foreign court in the case shall be granted, unless otherwise provided in an international treaty to which both parties are parties or to which they are parties. If the judgment or ruling of a foreign court has been recognized by the people's court, the people's court shall not accept the case if the parties concerned have filed a lawsuit with the people's court in respect of the same dispute."

iv, See the decision of Yichang Intermediate Court on Automotive Gate FZCO's application for recognition and enforcement of arbitral award in Hong Kong SAR, 2015 E Yi Zhong Min Ren No. 00002, in which the court rejected to enforce a HKIAC award on the basis that the award rendered in 2013 is contradictory with Shijiazhuang Intermediate Court's ruling on the invalidity of arbitration agreement, which amounted to a breach of public policy in Mainland China, though the ruling was made five year later than the disputed award.

Chukwudi Ojiegbe on International Commercial Arbitration in the European Union

Chukwudi Ojiegbe has just published a book titled: “International Commercial Arbitration in the European Union: Brussels I, Brexit and Beyond” with Edward Elgar Publishing.



The abstract reads as follows:

This illuminating book contributes to knowledge on the impact of Brexit on international commercial arbitration in the EU. Entering the fray at a critical watershed in the EU’s history, Chukwudi Ojiegbe turns to the interaction of court litigation and international commercial arbitration, offering crucial insights into the future of EU law in these fields.

Ojiegbe reviews a plethora of key aspects of the law that will encounter the aftermath Brexit, focusing on the implications of the mutual trust principle and the consequences for the EU exclusive competence in aspects of international commercial arbitration. He explores the principles of anti-suit injunction and other mechanisms that may be deployed by national courts and arbitral tribunals to prevent parallel court and arbitration proceedings. Advancing academic debate on the EU arbitration/litigation interface, this book suggests innovative solutions

to alleviate this longstanding and seemingly intractable issue.

Arriving at a time of legal uncertainty, this book offers crucial guidance for policymakers and lawyers dealing with the interaction of court litigation and international commercial arbitration in the EU, as well as academics and researchers studying contemporary EU and commercial law.

Anyone interested in the interface between commercial arbitration and the Brussels I regime should read this book – they will find much value in doing so. It is highly recommended.

More information may be found here and here

Determining the applicable law of an arbitration agreement when there is no express choice of a governing law – Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38.

This brief note considers aspects of the recent litigation over the identification of an unspecified applicable law of an arbitration agreement having an English seat. Though the UK Supreme Court concluded that the applicable law of the arbitration agreement itself was, if unspecified, usually to be the same as that of the contract to which the arbitration agreement refers, there was an interesting division between the judges on the method of determining the applicable law of the arbitration agreement from either the law of the arbitral seat (the view

favoured by the majority) or from the applicable law of the underlying contract (the view favoured by the minority). As will become clear, the author of this note finds the views of the minority to be more compelling than those of the majority.

In a simplified form the facts were that, in February 2016, a Russian power station was damaged by an internal fire. 'Chubb', insurer of the owners of the power station, faced a claim on its policy. In May 2019, Chubb sought to sue 'Enka' (a Turkish subcontractor) in Russia to recover subrogated losses. Enka objected to these Russian proceedings claiming that under the terms of its contract of engagement any such dispute was to be arbitrated via the ICC in England: in September 2019, it sought declaratory orders from the English High Court that the matter should be arbitrated in England, that the applicable law of the arbitration agreement was English, and requested an English anti-suit injunction to restrain Chubb from continuing the Russian litigation.

Neither the arbitration agreement nor the contract by which Chubb had originally engaged Enka contained a clear provision specifically and unambiguously selecting an applicable law. Though it was plain that the applicable law of the underlying contract would, by the application of the provisions of the Rome I Regulation, eventually be determined to be Russian, the applicable law of the arbitration agreement itself could not be determined as directly in this manner because Art. 1(2)(e) of the Regulation excludes arbitration agreements from its scope and leaves the matter to the default applicable law rules of the forum.

After an unsuccessful interim application in September 2019, Enka's case came before Baker J in December 2019 in the High Court. It seems from Baker J's judgment that Enka appeared to him to be somewhat reticent in proceeding to resolve the dispute by seeking to commence an arbitration; this, coupled with the important finding that the material facts were opposite to those that had justified judicial intervention in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, may explain Enka's lack of success before the High Court which concluded that the correct forum was Russia and that there was no basis upon which it should grant an anti-suit injunction in this case.

In January 2020, Enka notified Chubb of a dispute and, by March 2020, had filed a request for an ICC arbitration in London. Enka also however appealed the decision of Baker J to the Court of Appeal and duly received its requested declaratory relief plus an anti-suit injunction. The Court of Appeal sought to

clarify the means by which the applicable law of an arbitration agreement should be determined if an applicable law was not identified expressly to govern the arbitration agreement itself. The means to resolve this matter, according to the court, was that without an express choice of an applicable law for the arbitration agreement itself, the curial law of the arbitral seat should be presumed to be the applicable law of the arbitration agreement. Thus, though the applicable law of the underlying contract was seemingly Russian, the applicable law of the arbitration agreement was to be presumed to be English due to the lack of an express choice of Russian law and due to the fact of the English arbitral seat. Hence English law (seemingly wider than the Russian law on a number of important issues) would determine the scope of the matters and claims encompassed by the arbitration agreement and the extent to which they were defensible with the assistance of an English court.

In May 2020, Chubb made a final appeal to the UK Supreme Court seeking the discharge of the anti-suit injunction and opposing the conclusion that the applicable law of the arbitration agreement should be English (due to the seat of the arbitration) rather than Russian law as per the deduced applicable law of the contract to which the arbitration agreement related. The UK Supreme Court was thus presented with an opportunity to resolve the thorny question of whether in such circumstances the curial law of the arbitral seat or the applicable law of the agreement being arbitrated should be determinative of the applicable law of the arbitration agreement. Though the Supreme Court was united on the point that an express or implied choice of applicable law for the underlying contract usually determines the applicable law of the arbitration agreement, it was split three to two on the issue of how to proceed in the absence of such an express choice.

The majority of three (Lords Kerr, Hamblen and Leggatt) favoured the location of the seat as determinative in this case. This reasoning did not proceed from the strong presumption approach of the Court of Appeal (which was rejected) but rather from the conclusion that since there had been no choice of applicable law for either the contract or for the arbitration agreement, the law with the closest connection to the arbitration agreement was the curial law of the arbitral seat. As will be seen, the minority (Lords Burrows and Sales) regarded there to have been a choice of applicable law for the contract to be arbitrated and proceeded from this to determine the applicable law of the arbitration agreement.

The majority (for the benefit of non-UK readers, when there is a majority the law

is to be understood to be stated on this matter by that majority in a manner as authoritative as if there had been unanimity across all five judges) considered that there was no choice of an applicable law pertinent to Art.3 of Rome I in the underlying contract by which Enka's services had been engaged. It is true that this contract did not contain a helpful statement drawn from drafting precedents that the contract was to be governed by any given applicable law; it did however make many references to Russian law and to specific Russian legal provisions in a manner that had disposed both Baker J and the minority in the Supreme Court to conclude that there was indeed an Art.3 choice, albeit of an implied form. This minority view was based on a different interpretation of the facts and on the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ EU No C 282-1). The majority took the view that the absence of an express choice of applicable law for the contract must mean that the parties were unable to agree on the identity of such a law and hence 'chose' not to make one. The minority took the view that such a conclusion was not clear from the facts and that the terms of the contract and its references to Russian law did indicate an implied choice of Russian law. As the majority was however unconvinced on this point, they proceeded from Art.3 to Art.4 of Rome I and concluded that, in what they regarded as the absence of an express or implied choice of applicable law for the contract, Russian law was the applicable law for the contract.

For the applicable law of the arbitration agreement itself, the majority resisted the idea that on these facts their conclusion re the applicable law of the contract should also be determinative for the applicable law of the arbitration agreement. Instead, due to the Art.1(2)(e) exclusion of arbitration agreements from the scope of the Regulation, the applicable law of the arbitration agreement fell to be determined by the English common law. This required the identification of the law with which the arbitration agreement was 'most closely connected'. Possibly reading too much into abstract notions of international arbitral practice, the majority concluded that, in this case, the applicable law of the arbitration agreement should be regarded as most closely connected to the curial law of the arbitral seat. Hence English law was the applicable law of the arbitration agreement despite the earlier conclusion that the applicable law of the contract at issue was Russian.

As indicated, the minority disagreed on the fundamental issue of whether or not

there had been an Art.3 implied choice of an applicable law in the underlying contract. In a masterful dissenting judgment that is a model of logic, law and clarity, Lord Burrows, with whom Lord Sales agreed, concluded that this contract contained what for Art.3 of Rome I could be regarded as an implied choice of Russian law as '… clearly demonstrated by the terms of the contract or the circumstances of the case'. This determination led to the conclusion that the parties' implied intentions as to the applicable law of the arbitration agreement were aligned determinatively with the other factors that implied Russian law as the applicable law for the contract. Russian law was (for the minority) thus the applicable law of the underlying contract and the applicable law of the ICC arbitration (that, by March, 2020 Enka had acted to commence) was to take place within the English arbitral seat in accordance its English curial law. Lord Burrows also made plain that if had he concluded that there was no implied choice of Russian law for the contract, he would still have concluded that the law of the arbitration agreement itself was Russian as he considered that the closest and most substantial connection of the arbitration agreement was with Russian law.

Though the views of the minority are of no direct legal significance at present, it is suggested that the minority's approach to Art.3 of the Rome I Regulation was more accurate than that of the majority and, further, that the approach set out by Lord Burrows at paras 257-8 offers a more logical and pragmatic means of settling any such controversies between the law of the seat and the law of the associated contract. It is further suggested that the minority views may become relevant in later cases in which parties seek a supposed advantage connected with the identity of the applicable law of the arbitration. When such a matter will re-occur is unclear, however, though the Rome I Regulation ceases to be directly applicable in the UK on 31 December 2020, the UK plans to introduce a domestic analogue of this Regulation thereafter. It may be that a future applicant with different facts will seek to re-adjust the majority view that in the case of an unexpressed applicable law for the contract and arbitration agreement that the law of the seat of the arbitration determines the applicable law of the arbitration agreement.

As for the anti-suit injunction, it will surprise few that the attitude of the Court of Appeal was broadly echoed by the Supreme Court albeit in a more nuanced form. The Supreme Court clarified that there was no compelling reason to refuse to consider issuing an anti-suit injunction to any arbitral party who an English judge

(or his successors on any appeal) has concluded can benefit from such relief. They clarified further that the issuance of an anti-suit injunction in such circumstances does not require that the selected arbitral seat is English. The anti-suit injunction was re-instated to restrain Chubb's involvement in the Russian litigation proceedings and to protect the belatedly commenced ICC arbitration.

Waiving the Right to a Foreign Arbitration Clause by submitting to the Jurisdiction of the Nigerian Court

Introduction

Commercial arbitration is now very popular around the globe. It forms an important part of Nigerian jurisprudence. In Nigeria, it is regulated by the Arbitration and Conciliation Act ("ACA").[1]

Clauses designating an arbitral tribunal to resolve dispute between parties are now common place in international commercial transactions. Generally, the Nigerian courts respect and strictly enforce the parties' choice to resolve their dispute before an arbitral tribunal in both domestic and international cases.[2] This right is however not absolute. The right to resolve disputes before an arbitral tribunal could be waived by submitting to the jurisdiction of the Nigerian court. Indeed, Section 5(1) of the ACA provides that: "If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceeding."[3] In essence, if a party to an international arbitration clause delivers any pleadings

or takes any steps in the proceedings, such a party is deemed to have waived its right to an arbitration clause by submitting to the jurisdiction of the Nigerian court,

What provokes this comment is that in a recent Nigerian Court of Appeal decision in *The Vessel MT. Sea Tiger & Anor v Accord Ship Management (HK) Ltd*[4] ("*Tiger*"), the Court of Appeal held *inter alia* that where a party is served with a judicial claim, in breach of a foreign arbitration clause, but fails or refuses to appear before the court, such a party is deemed to have waived its right to an arbitration agreement by submitting to the jurisdiction of the Nigerian Court. It also held that payment of an out of court settlement amounts to submission.

This comment opines that the Court of Appeal's decision was wrongly decided insofar as it held that where proceedings are instituted in breach of a foreign arbitration clause, failure or refusal to appear before judicial proceedings, and payment of an out of court settlement amounts to waiver by submitting to the jurisdiction of the court.

Facts

In *Tiger,* the 2nd plaintiff-appellant and the 1st defendant-respondent – both foreign companies before the Nigerian Court – entered into a ship management agreement on 18th of February 2012 in Hong Kong for the management of the 1st plaintiff-appellant vessel. The parties agreed in clause 23 and 25 of the ship management agreement that any dispute arising from their agreement shall be referred to international arbitration in London.

When a dispute arose as to the payment of the management fees between the parties, the 1st defendant-respondent instituted proceedings (suit No. FHC/L/CS/1789/2013) at the Federal High Court, Nigeria for the arrest of the 1st plaintiff-appellant vessel. In that proceeding, the 1st defendant-respondent (as plaintiff) sued the plaintiff-appellants (the vessel and owners of the vessel) as the defendants in that case. The plaintiff-appellants settled the claim out of court by making payments to the 1st defendant-respondent. Subsequently, on 27th February 2014, the 1st defendant-respondent as plaintiff in suit No. FHC/L/CS/1789/2013 withdrew its suit and the vessel was ordered to be released.

In consequence of the arrest of the 1st plaintiff-appellant from 31st December 2013 to 27th February 2018, the appellants sued the defendant-respondents in the Federal High Court, Lagos for a significant amount of compensation arising from what it claimed to be the wrongful arrest of the 1st plaintiff-appellant in breach of their agreement to settle their dispute by international arbitration in London.

Decision

The Court of Appeal unanimously dismissed the claim of the plaintiff-appellants by holding that they had waived their right to the international arbitration clause by submitting to the jurisdiction of the Nigerian Court. The decision was reached on two principal grounds. The first ground was failure or refusal to appear and challenge the proceedings after being served with court processes. The second ground was the payment of an out of court settlement in order to release the vessel. In order to provide more clarity, the relevant portions of the decisions are quoted.

First, Garba JCA in his leading judgment held that:

The failure or refusal by it (plaintiff-appellants) to appear in reaction to the originating processes to enable the appellant challenge the jurisdiction of the lower court on the ground of the arbitration clauses in the Ship Management Agreement…left no other reasonable presumption in law and option to the lower court than that the appellants had submitted to the jurisdiction of that court to adjudicate over the suit since the only challenge to the suit by the appellants was entirely and completely predicated and founded on the arbitration clauses in the Ship Management Agreement and not on the lack of jurisdiction on the part of the court, in any event, entertain the suit on any cognizable ground of law. The failure or refusal to enter an appearance and be represented in the suit constituted and amounted to a muted but clear submission to the jurisdiction of the lower court in the case.[5]

Second, Garba JCA held that: "…the lower court is right that the appellants submitted to its jurisdiction in the suit no:FHC/L/CS/1789/2013 by the payment and settlement of the 1st respondent's claim in order to secure the release of the

1st appellant from the arrest and detention it was placed under in the case thereby not only taking a step in the case, but actively and effectively so, in the circumstances of the case."[6]

Comments

The Court of Appeal's decision in *Tiger* is very important from the perspective of private international law and international commercial arbitration. The implication of *Tiger* is that where proceedings are instituted in a Nigerian court in breach of a foreign arbitration clause, the party requesting arbitration would be wise to *appear* before the court and immediately request the court to stay its proceedings in favour of a foreign arbitration clause. If this is not done, an international arbitration clause is ineffective in Nigerian law on the basis that the party requesting arbitration would be deemed to have waived its right by submitting to the jurisdiction of the court. In addition, the payment of an out of court settlement would amount to waiver by submitting to the jurisdiction of a Nigerian court.

Prior to *Tiger,* waiver to an arbitration clause by submitting to the jurisdiction of the Nigerian court could only be established where the defendant enters an unconditional appearance or defends the case on its merits without challenging the jurisdiction of the court.[7]

It is submitted that *Tiger* is a wrong extension of the principle to the extent that it holds that failure or refusal to appear before proceedings which breach an international arbitration clause constitutes waiver by submission to the jurisdiction of a court. A defendant that does not appear before court proceedings cannot be deemed to have waived its right by submitting to the jurisdiction of the Nigerian court. In other words, failure or refusal to appear to proceedings upon being duly notified is the very antithesis of submission to the jurisdiction of a court. Indeed, there is an earlier Nigerian Supreme Court's decision that clearly held that failure or refusal of a defendant resident in Nigeria to appear in the English court despite being duly notified of judicial proceedings in England, did not qualify as submission to the jurisdiction of the English court.[8] Though this Supreme Court case was concerned with the recognition and enforcement of foreign judgments under the 1922 Ordinance, the logic of this decision can be

way of analogy be applied in *Tiger's* case to the effect that failure or refusal to appear to court proceedings cannot constitute submission. In this connection, the Court of Appeal's decision in *Tiger* is therefore *per incuriam*.

It is illogical to hold that that a defendant who has failed or refused to appear to court proceedings has "delivered pleadings" or "taken steps in the proceedings" in the eyes of Section 5 of the ACA. A defendant is entitled to ignore court proceedings by sticking to the arbitration clause. This should also be seen as a pro-arbitration stance that is consistent with Nigeria's approach of upholding the sanctity of arbitration agreements. Indeed, as stated in the introduction, Nigerian courts generally enforce arbitration agreements strictly.

The truth is that *Tiger's* case reflects the attitude of some Nigerian judges to absentee defendants. Some Nigerian judges regard it as impolite for a defendant not to appear to court proceedings upon being duly notified. The preferable approach in Nigerian jurisprudence is to enter a *conditional appearance* and then challenge the jurisdiction of the court. Indeed, in *Muhammed v Ajingi,*[9] the Court of Appeal (Abiru JCA) unanimously held that a defendant who has been duly notified of proceedings but fails or refuses to appear to promptly challenge the jurisdiction of the court is deemed to have waived its right by submitting to the jurisdiction of the Nigerian court. Though, *Muhammed v Ajingi* was not an arbitration case, it demonstrates the attitude of some Nigerian judges to absentee defendants.

The Court of Appeal in *Tiger* was also wrong to have regarded the payment of an out of court settlement sum by the plaintiff-appellants to release the vessel as waiver by submitting to the jurisdiction of the court. Such an approach does not amount to delivering pleadings or taking steps in the proceedings in the eyes of Section 5 of the ACA. Indeed, in the earlier case of *Confidence Insurance Ltd*,[10] the Court of Appeal (Achike JCA) unanimously held that: "effort made out of court to settle the matter in controversy between the parties"[11] does not amount to submission in the eyes of Section 5 of the ACA. Nigerian courts should be seen to encourage out of court settlement. The Court of Appeal in *Tiger* did not explicitly have regard to Achike JCA's judicial opinion in *Confidence Insurance Ltd*, though it cited the case. There is wisdom in Achike JCA's judicial opinion. If the law is that efforts made towards out of court settlement amounts to submission, this might discourage a potential defendant from making out of court settlements, where there is the presence of a foreign arbitration clause.

Moreover, the payment of the settlement sum by the plaintiff/appellants was for the purpose of releasing their vessel which had been detained on the order of a Nigerian court. Comparatively, this has never qualified as submission to the jurisdiction of the court in England. Payment of settlement to release the vessel is hardly ever voluntary – the claimant in such maritime claims can use the arrest of the vessel as a way of wrongfully obtaining settlement. Indeed, there are English cases where damages have been awarded for wrongful detention of vessel despite the other party paying a settlement sum to the party that arrested the vessel.[12]

Tiger properly so called was an action in damages for breach of an international arbitration clause. Since it has been argued in this case that the plaintiff-appellants did not submit to the jurisdiction of the Nigerian court, damages should have been awarded for breach of the international arbitration clause.[13] If the Court of Appeal had adopted this approach, it would have honoured the Nigerian judiciary's approach to generally and strictly enforce the sanctity of arbitration agreements. It was obvious in this case that the plaintiff-appellants suffered loss from the arrest of their ship in breach of an international arbitration clause. It is quite unfortunate that the Court of Appeal did not award compensation in this case.

Conclusion

It remains to the seen whether *Tiger* will go on appeal to the Nigerian Supreme Court. If it does go on appeal, it is proposed that the Supreme Court overturns the Court of Appeal's decision. If it does not go on appeal to the Supreme Court, it is proposed that the Nigerian Court of Appeal and Supreme Court in future holds that the failure or refusal to appear to proceedings in breach of an international arbitration clause, and the payment of out of court settlement does not constitute waiver by submission to the jurisdiction of the Nigerian court.

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[1]Cap. A18, LFN 2004.

[2]The cases in support of this are numerous. It is sufficient to cite the Nigerian Supreme Court authorities: *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469; *Mainstreet Bank Capital Limited* & *Another v Nigeria Reinsurance Corporation Plc* (2018) 14 NWLR (Pt. 1640) 423, 444 (Kekere-Ekun JSC). See also CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 127-138.

[3]It is a matter if Section 5 of the ACA applies to only domestic arbitration, and not international commercial arbitration. In *Owners of MV Lupex* (*supra* n 2) the Nigerian Supreme Court applied Section 5 of the ACA to international commercial arbitration. However, in a later case of *SPDCN Ltd v CIRN Ltd* (2016) 9 NWLR (Pt. 1517) 300, 323 (Obaseki-Adejumo JCA), the Court of Appeal, relying on Section 58 of the ACA, held that the ACA only applies to domestic arbitration. If the Court of Appeal's decision is correct, then Section 5 of the ACA only applies to domestic arbitration.

It is submitted that the Supreme Court's position in *Owners of MV Lupex* is preferred for three reasons. First, Section 58 of the ACA means that the ACA applies in all States of the Federation, and not that the ACA applies only to domestic arbitration. Second, there is no specific provision that states that the ACA does not apply to international arbitration. Third, Part III of the ACA has a title which states that it relates to "ADDITIONAL PROVISIONS RELATING TO INTERNATIONAL ARBITRATION AND CONCILIATION." This implies that the ACA governs domestic and international commercial arbitration, with Part III of the ACA making additional provisions relating to arbitration.

[4](2020) 14 NWLR (Pt. 1745) 418.

[5]*Tiger* (n 4) 453-4.

[6] *Ibid* 457.

[7]*Obembe v Wemabod Estates Ltd.* (1977) 5 SC 115 (Fatayi-Williams JSC as he then was); *K.S.U.D.B. v Fanz Const; Ltd.* (1990) 4 NWLR (Pt. 142) 1, 27 (Agbaje JCS), 50 (Obaseki JSC); *Mainstreet Bank Capital Limited* & *Another v Nigeria Reinsurance Corporation Plc* (2018) 14 NWLR (Pt. 1640) 423, 445-6, 452 (Kekere-Ekun JSC); *Onward Ent. Ltd. v MV Matrix* (2010) 2 NWLR (Pt. 1179) 530, 551; *Federal Ministry of Health v Dascon (Nig.) Ltd* (2019) 3 NWLR (Pt. 1658) 127, 139-140 (Abiriyi JCA); *SCOA (Nig) Plc v Sterling Bank Plc* (2016) LPELR-40566

(CA) (Oseji JCA as he then was) *Sino-Africa Agriculture & Ind Company Ltd and Others v Ministry of Finance Incorporation and Another* (2013) LPELR-22379 (CA) 1, 33 – 36, (2014) 10 NWLR (Pt. 1416) 515, 537 (Orji-Abadua JCA); *Osun State Government v Dalami (Nig.) Ltd* (2003) 7 NWLR (Pt. 818) 72, 93, 101 (Onalaja JCA); *Confidence Insurance Ltd v Trustees of O.S.C.E.* (1999) 2 NWLR (Pt.591) 373, 386 (Achike JCA as he then was).

[8]*Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309. In this case the Supreme Court was interpreting Section 3(2)(b) of the Reciprocal Enforcement of Judgments Act 1922, Cap 175 LFN 1958 ("1922 Ordinance"), which provides that the Nigerian court will refuse to register a foreign judgment where a judgment-debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court. This implies that *not voluntarily appearing* before a Nigerian court does not constitute submission despite being duly notified with court processes. Indeed, Section 3(2)(b) is a codification of Nigerian common law on what qualifies as submission as a basis of jurisdiction in private international law matters. Under common law, submission in establishing jurisdiction in private international law against a defendant can only be established where there is unconditional appearance, defending the case on its merits without challenging the court's jurisdiction or counter-claim.

[9] (2013) LPELR-20372 (CA).

[10] (n 7).

[11] *Ibid* 386.

[12] See *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2)* [2001] EWCA Civ 505; *Kallang Shipping SA v AXA Assurance Senegal* [2008] EWHC 2761 (Comm).

[13]See Okoli and Oppong (n 2)

138; JC Betancourt, "Damages for Breach of an International Arbitration Agreement under English Arbitration Law" (2018) 34 *Arbitration International* 511-532.

R. Brand on Provisional Measures in Aid of Arbitration

The success of the New York Convention has made arbitration a preferred means of dispute resolution for international commercial transactions. Success in arbitration often depends on the extent to which a party may, in advance, ensure that assets or evidence is secured in advance, or that the other party is required to take steps to secure the status quo. This makes the availability of provisional measures granted by either arbitral tribunals or by courts important to the arbitration process. In this chapter, Ron Brand of the University of Pittsburgh School of Law considers the existing legal framework for such provisional measures in aid of arbitration, giving particular attention to the source of the rules that might govern such relief related to international commercial transactions and the arbitration of disputes they may generate. These include the New York Convention, the applicable lex arbitri, institutional arbitration rules, and the arbitration contract. He considers how these sources do or do not provide a comprehensive and coherent framework for effective dispute resolution – including especially the effective satisfaction of any resulting arbitral award – and some of the ways in which the arbitration clause may be drafted to specifically

take into account the often unanticipated, but always possible, need for provisional measures.

TThe article is accessible here

Chinese Court Holds Arbitral Award by Foreign Arbitration Institutions in China Enforceable

(This is another version of views for the recent Chinese case on international commercial arbitration provided by Chen Zhi, a PhD candidate in the University of Macau, Macau, PRC)

On 6 August 2020, Guangzhou People's Intermediate Court ("Guangzhou court") handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration ("ICC") in China,[1] which have given rise to heated debate by the legal community in China. This case was thought to be of great significance by many commentators because it could open the door for enforcement of arbitral awards issued by foreign institution with seat of proceeding in China, and demonstrates the opening-up trend for foreign legal service.
[1]Brentwood Industries Inc. v. Guangdong Faanlong Co, Ltd and Others 2015 Sui Zhong Min Si Fa Chu No.62?

Backgrounds of the facts
The plaintiff, Brentwood Industries, Inc. a USA based company, entered into a Sale and Purchase Agreement ("SPA") along with a Supplementary Agreement with three Chinese companies (collectively, "Respondents") in April 2010. Article 16 of Sale and Purchase Agreement provided as follow:
Any dispute arising out of or in connection with this contract shall be settled by amicable negotiation between the parties. If such negotiations fail to resolve the dispute, the matter shall be referred to the Arbitration Commission?sic?of

International Chamber of Commerce for arbitration at the project site in accordance with international practice. The award thereof shall be final and binding on the Parties. The costs of the arbitration shall be borne by the losing party, unless the Arbitration Commission?sic?decides otherwise. The language of the arbitration shall be bilingual, English and Chinese.

According to Article 3 of Supplementary Agreement, the project site was in Guangzhou.
On 29 May 2011, Brentwood submitted an application to Guangzhou Court, seeking for nullification of the arbitration clause in SPA. The Guangzhou Court handed down a judgement in early 2012 rejecting Brentwood's application and confirming the validity of the arbitration clause.
Because the ICC does not have an office in Guangzhou, Brentwood subsequently commenced an arbitration proceeding before Arbitration Court of International Chamber of Commerce Hong Kong Office on 31 August of 2012. In the course of proceeding, all three respondents participate in the arbitration presenting their written defenses, and among them, one respondent also raised objection of jurisdiction of the ICC Court to handle the case. The ICC Court decided that the jurisdiction issue shall be addressed by a sole arbitrator after giving all parties equal opportunities to present their arguments. Hence, with the consensus of all parties, the ICC Court appointed a sole arbitrator on 10 January of 2013.

On 3rd April 2013, the case management conference was held in Guangzhou and each party appeared and agreed upon the Term of Reference. After exchange of written submissions and hearing (all attended by all parties), the arbitrator rendered Final Award with the reference No. 18929/CYK (the Final Award) on 17 March 2014.

Enforcement proceeding and judgment
Brentwood sought to enforce the Final Award before the Guangzhou Court, mainly on the basis of non-domestic award as prescribed in Article 1(1) of the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which China is a signatory party ("New York Convention"). To increase its options in obtaining enforcement, Brentwood also invoked the Arrangement on Reciprocal Enforcement of Arbitral Awards Between SPC and Hong Kong Special Administrative Region Government, in the event the court regards the award as Hong Kong award because conducted by the ICC Hong Kong Office.

The Respondents raised their own objections respectively, which can be summarized to four main points:
(1) non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter;
(2) the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017);
(3) there are substantive errors in the Final Award;
(4) the arbitrator exceeded its power in the Final Award.

The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law (revised in 2012), and stipulated that the awards by foreign-related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

China's Stance to domestic award by foreign institutions
There is no law directly applicable to awards issued by foreign institution with seat in China. The current legislation divided awards into three categories:
(1) domestic award rendered by Chinese arbitration institutions, which is governed by the Arbitration Law and Civil Procedure Law.
(2) foreign-related award made by Chinese institutions, which is enforceable under Article 273 of Civil Procedure Law.
(3) awards made offshore, which are governed by international conventions (i.e. New York Convention), judicial arrangements and Supreme People Court's judicial interpretation depending on the place of arbitration.

The problem arises mainly because of the conflict between Chinese law and international conventions. Unlike the common practice in international arbitration across the world, which decides the nationality of award and competent court for remedies thereof based on the seat of arbitration proceeding, Chinese law traditionally relied upon the nationality of arbitration institutions instead. The

term “arbitration seat” was not embedded in the legislation framework until the SPC’s Interpretation on Application of Arbitration Law in 2006, and Supreme People’s Court only begins to decide the nationality of award based on the seat since 2009.[2]

Due to the lacuna in law, there is no remedy for such China seated foreign award, and therefore parties may face enormous legal risks: on one hand, such award cannot be enforced by any Chinese court if the losing party refuse to perform it voluntarily, on the other hand, the party who is dissatisfactory with the award or arbitration proceeding has no way to seek for annulment of the award.

In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing,[3] granting enforcement by regarding the disputed award as “non-domestic” award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms,[4] because China had filed the reservation set out in Article 1(3) of New York Convection confirming that it will apply the Convention to the “recognition and enforcement of awards made only in the territory of another Contracting State”. In other words, said non-domestic award approach shouldn’t be use by Chinese courts.

With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention.

[2]See Article 16 of SPC’s Interpretation on Several Questions in Application of Arbitration Law Fa Shi 2006 No.7, see also SPC’s Notice on Matters of Enforcing Hong Kong Award in Continental China Fa 2009 No. 415. As cited in Gao Xiaoli, The Courts Should Decide the Nationality of Arbitral Award by Seat Instead of Location of Arbitration Institution, People’s Judicature (Volume of Cases), Vol.2017 No. 20, p. 71.

[3] Duferco S.A. v. Ningbo Art & Craft Import & Export Corp. 2008 Yong Zhong Jian No.8.

[4] Author Dong et al, Does Supreme People’s Court’s Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?, available at

http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/

Comments

Brentwood decision does not appear out of thin air, but contrarily, it is in line with the opening-up trend in the judicial practice of commercial arbitration in China started in 2013. At that time, the Supreme People's Court ruled on the landmark Longlide case by confirming the validity of arbitration agreement which require arbitration proceeding conducted by foreign arbitration in China.[5]This stance has been followed and further developed by the First Intermediate Court of Shanghai in the recent Daesung Industrial Gases case,[6]. In this case, a clause providing "arbitration in Shanghai by Singapore International Arbitration Center" was under dispute by two respondents who alleged that foreign based institutions were prohibited from managing arbitration proceeding in China. However the court viewed this assertion as lacking of legal basis in Chinese law, and was contradictory to the developing trend of international commercial arbitration in the PRC.

In addition, local administrative authorities have shown firm stance and laudable attempt to promote the opening-up policy by attracting foreign institutions to carry out business in China. In late 2019, the justice department of Shanghai adopted new policies permitting foreign arbitration bodies to setup branch and carry out business in Lingang Free Trade Pilot Zone, and to set up detailed rules for registration and supervision in this regard.[7] On 28 August of 2020, the State Council agreed to a new proposal jointly by the Beijing government and the Ministry of Commerce on further opening up service industry, allowing world-renowned offshore arbitration institutions to run business in certain area of Beijing after registration at the Beijing justice department and the PRC Justice Ministry. This goes even further than Shanghai's policy by stipulating that competent authorities shall support preservations for arbitration proceeding, increasing the reach of foreign institution on local justice system.[8]

Nevertheless, there are still lots of works to be done for the landing of foreign institutions:

First, as the lacuna in the law still exists, the judicial policy will continue to be "uncertain, fraught with difficulty and rapidly evolving" in this regard, as described by the High Court of Singapore. [9] Because Article 273 of Civil Procedural Law does not contain award by foreign institution stricto senso, and

Guangzhou Court applied it only on analogous basis, this approach is more likely to be an expedient measure by taking into account surrounding circumstances (i.e. the validity of arbitration clause in dispute had been confirmed by the court itself, and all respondents had actively participated in the arbitration proceeding), instead of corollary of legal terms. Further, albeit the decision in Brentwood case is consistent with SPC's opening-up and arbitration friendly policy, no evidence shows its legal validity was endorsed by SPC like that in Longlide case. Therefore, it is doubtful whether this approach will be employed by other courts in future.
Second, even though the validity and enforceability issues have been settled, the loophole in law concerning auxiliary measures (i.e. interim relief, decision of jurisdiction, etc.) and annulment proceeding remains unsolved, which will probably be another obstruction for foreign institution to proceed with arbitration proceeding in Continental China. The above mentioned proposal by Beijing government provides a good example in this respect, while this problem can only be fully settled through revision of law.

Third, the strict limitations on the content of arbitration agreement remain unchanged. Arbitration agreements providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also unacceptable under current judicial policy, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years, however whilst the above issues have been formally lifted, the arbitration agreement shall be well drafted in terms of both arbitration institution and the seat of arbitration.

[5] Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (SPC Docket Number: 2013-MinTa Zi No.13).
[6] Daesung Industrial Gases Co., Ltd.&Another v. Praxair (China) Investment Co., Ltd 2020 Hu 01 Min Te No.83.
[7] See: Measures for the Establishment of Business Bodies by Offshore Arbitration Institutions in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai) available at http://sfj.sh.gov.cn/xxgk_gfxwj/20191020/3fbcd61ef43147379c5841e28bdf6007.html
[8] See Article 8 of State Council's Instruction on the Work Plan for the Construction of a National Demonstration Zone for Expanding and Opening Up Beijing's Services Industry in a New Round of Comprehensive Pilot

Project?available at http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm?trs=1

[9] BNA v BNB [2019] SGHC 142 para.116.

UK Supreme Court on law applicable to arbitration agreements

*Written by **Stephen Armstrong**, lawyer practicing in Toronto, Ontario, Canada with an interest in international arbitration.* [Linkedin]

On Friday, October 9, 2020, the United Kingdom Supreme Court released an interesting decision concerning the applicable law governing arbitration agreements in international contracts and the jurisdiction of the courts of the seat of the arbitration to grant anti-suit injunctions. The case is *Enka Insaat Ve Sanayi A.S. v 000 Insurance Company Chubb*, [2020] UKSC 38.

The full text of the Supreme Court's decision is available **here**.

A digestible summary of the case, including the facts, the breakdown of votes, and the reasons, is available **here**.

Interestingly, the Supreme Court fundamentally disagreed with the Court of Appeal on the role of the seat of the arbitration for determining the law of the arbitration agreement. The Supreme Court held that an express choice of law in the main contract should be presumptively taken as an implied choice of law governing the arbitration agreement. By contrast, the Court of Appeal had held that the law of the seat was the parties' presumptive implied choice of law for the arbitration agreement. The Supreme Court did, however, affirm the Court of Appeal's holding that the courts of the seat are always an appropriate forum to grant an anti-suit injunction, regardless of the applicable law.

Unlike other choice of law issues in the UK, this issue is governed by the common law, rather than the EU's Rome I regulation. This makes the Supreme Court's decision a common law authority, rather than an EU law authority. I therefore expect that this decision will find purchase throughout the Commonwealth, including my home jurisdiction of Ontario, Canada.